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In the Supreme Court of the United States

OCTOBER TERM 1963

No. 255

BROS INCORPORATED

Petitioner

vs.

BROWNING MANUFACTURING COMPANY AND SHOVEL SUPPLY CO., INC.

Respondents

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Hayward-Court Brief Ptg. Co., Mpls. 15, Minn.

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Respondents' brief appears to emphasize rather than minimize the necessity for Supreme Court rulings on the questions presented in the Petition now before the Court. The importance of the issues is now further accentuated by the decision of the Fifth Circuit Court of Appeals in the related case of *Bros Incorporated v. W. E. Grace Manufacturing Company, et al.*, referred to on pages 4 and 10 of the present Petition. As that decision (as yet reported only in 138 USPQ 357) was not received until after the present Petition was prepared and filed, and has received but cursory consideration in respondents' brief, a few further observations appear necessary.

In the Fifth Circuit case both the Grace Motion in the

District Court as well as the Grace Notice of Appeal specifically requested a new trial on the sole basis of one that would be—

> "devoted to the issue of statutory invalidity of the (Bros) patent in suit by reason of prior description in a printed (Bros) publication, contrary to the conditions prescribed by 35 U.S.C. 102(b)."

No other issue is involved, and that is the precise issue here presented.

In granting the new trial the Fifth Circuit Court of Appeals makes it specifically and abundantly clear by its Footnote 25, and, as in its closing paragraph, that—

> "It is far too early to foretell whether, on the merits, the Texas District Court or this Court would or would not agree with the Minnesota Court, or now, the 8th Circuit."

The Fifth Circuit decision also points out (Part VIII) that this

> "is not—the more routine case in which validity or invalidity turns on intricate evidentiary questions of prior art, anticipation, lack of invention, novelty, or the like"

and recognizes that

> "The public interest in a governmentally bestowed monopoly is of trascendent importance."

Thus, and as matters now stand, the Bros patent in suit is valid in the Sixth Circuit, invalid in the Eighth Circuit, and of undetermined status in the Fifth as well as all other circuits. To add to the confusion thus generated it may be noted, as pointed out in the Fifth Circuit decision, (Part VIII) as—

"of unique significance here for the papers show that the Minnesota plaintiffs are Texas concerns, and another infringement suit brought by the Patentee remains untried in San Antonio (Texas)."

In short, and if the Fifth Circuit eventually concludes that there is no "basic statutory infirmity" in the Bros patent, then the two Texas plaintiffs (present respondents) will escape liability for infringement while all other infringers in all circuits except the Eighth may well be obliged to respect the patent, unless, of course, the present Petition is granted and this Court passes on the issues that have been squarely raised by the Petition.

Under such circumstances the most impelling reasons exist to justify the intervention of this Court, not only for resolving the conflict between the Sixth and Eighth Circuit conclusions with respect to validity, but to guide the Fifth Circuit as well as other courts on critical questions of substantive patent law that are here and apparently for the first time brought to the attention of this Court.

Practically all of respondents' objections to the Petition have already been fully met in the petitioner's initial presentation. Other criticisms are of a collateral, trivial and sometimes misleading nature which the Court will, we submit, have no difficulty in summarily disposing of without further authorities or argument in rebuttal.

The Petition should be granted.

Respectfully submitted,

ANDREW E. CARLSEN
Attorney for Petitioner

CERTIFICATE OF SERVICE

Three copies of the foregoing Petitioner's Brief in Reply to Respondents' Brief Opposing Petition for Writ of Certiorari have been served on the respondents by mailing said copies first class air mail, postage prepaid, to respondents' attorneys, Messrs. Parrott & Rankin, Wachovia Bank Building, Charlotte 2, North Carolina, this 16th day of August, 1963.

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